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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JORGE HERNANDEZ, Defendant.	Criminal Case No. 07CR2953-IEG **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS:** **(1) TO DISMISS INDICTMENT BECAUSE OF INVALID DEPORTATION;** **(2) SUPPRESS STATEMENTS;** **(3) DISMISS INDICTMENT FOR FAILURE TO ALLEGE LOCATION OF OFFENSE** **(4) DISMISS INDICTMENT FOR FAILURE TO ALLEGE DATE OF REMOVAL,** **(5) DISMISS INDICTMENT FOR FAILURE TO ALLEGE TEMPORAL RELATIONSHIP BETWEEN PRIOR CONVICTION AND REMOVAL,** **(6) DISMISS INDICTMENT FOR FAILURE TO ALLEGE MENS REA; AND** **(7) FOR LEAVE TO FILE FURTHER MOTIONS** **TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES** Date: April 7, 2008 Time: 2:00 p.m. Court: The Hon. Irma E. Gonzalez

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Rebecca S. Kanter, Assistant United States Attorney, and hereby files its Response and Opposition to the above-captioned motions. Said Response is based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

I

STATEMENT OF THE CASE

On October 30, 2007, a federal grand jury in the Southern District of California returned a one-count Indictment charging defendant Jorge Hernandez ("Defendant") with Attempted Entry After Deportation, in violation of Title 8, United States Code, Section 1326. On October 30, 2007, Defendant was arraigned on the Indictment and entered a plea of not guilty.

II

STATEMENT OF FACTS

A. DEFENDANT'S APPREHENSION

On September 4, 2007, at about 4:00 a.m., Defendant attempted to enter the United States from Mexico near Tecate, California. Defendant was first spotted by a California National Guard Unit operating a mobile infrared scope. Defendant was seen crossing the United States/Mexico boundary and hiding in the brush near Ceti's Hill, which is approximately 2 miles east and 100 yards north of the Teacate, California Port of Entry. Defendant was found lying down in the brush approximately 30 yards south of the Border Road. The Defendant admitted to being a citizen and national of Mexico with no documents to legally remain in the United States. Defendant was transported to the Tecate Processing Center.

B. DEFENDANT'S CRIMINAL HISTORY

Defendant has numerous arrests and convictions in California and Oregon. Defendant's more recent felony criminal history includes but is not limited to a conviction in the United States District Court for the Southern District of California on February 1, 2002, for Illegal Entry in violation of Title 8, United States Code Section 1325. Defendant was sentenced to 24 months custody by the Honorable Gordon Thompson, Jr.

Prior to that, Defendant was convicted in March, 1997, by the California Superior Court in Santa Clara for Possession of Marijuana for Sale in violation of California Health & Safety Code Section 11359, for which he received a sentence of 2 years imprisonment. Ten years later, in May, 2007, Defendant sustained a conviction in the California Superior Court in Santa Ana for Possession of a Controlled Substance in violation of California Health & Safety Code Section 11377(a).

C. DEFENDANT'S IMMIGRATION HISTORY

Defendant appeared before an Immigration Judge for a deportation hearing on November 20, 1995, and was physically removed from the United States to Mexico on November 21, 1995. Defendant was also removed on March 4, 1998, and July 8, 2003. Defendant was most recently physically removed to Mexico on August 22, 2007, approximately two weeks before the instant offense.

D. DEFENDANT'S POST-MIRANDA CONFESSION

Defendant was read his Miranda rights and advised of his right to notify the Mexican Consulate. Defendant waived his rights and admitted that he is a citizen and national of Mexico with no documents to legally enter or remain in the United States. He further admitted to having been previously deported from the United States. He stated that he knew he was breaking the law by crossing into the United States through the mountains. He admitted to prior arrests and a prior drug conviction. He stated he was en route to Santa Ana, California to find work.

III

DEFENDANT'S MOTIONS

A. DEFENDANT'S PRIOR DEPORTATION IS VALID

An alien may not challenge the validity of a prior deportation order in a criminal proceeding unless he can demonstrate that:

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d).

Because Defendant cannot satisfy the above three criteria, his motion to dismiss the indictment should be denied.

1. Defendant Waived His Right to Appeal

In this case, Defendant has failed to show that he exhausted his administrative remedies. "In a criminal proceeding, an alien cannot collaterally attack an underlying deportation order if he validly waived his right to appeal that order." United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000). In Garza-Sanchez, the Ninth Circuit held that:

> "A defendant charged under 8 U.S.C. § 1326 may not collaterally attack the underlying deportation order if he or she did not exhaust administrative remedies in the deportation proceedings, including direct appeal of the deportation order. [Citations omitted.] Accordingly, a valid waiver of the right to appeal a deportation order precludes a later collateral attack. [Citations omitted.]

217 F.3d 806, 808 (9th Cir. 2000). "In order for the waiver to be valid, however, it must be both 'considered and intelligent.'" Arrieta, 224 F.3d at 1079 (citing United States v. Estrada-Torres, 179 F.3d 776, 780-81

(9th Cir. 1999)). This Court has held that the "considered and intelligent" standard requires only that the immigration judge inform the alien of his right to appeal, explain it, and ask him whether he desires to exercise that right. See United States v. Estrada-Torres, 179 F.3d 776, 781, overruled on other grounds by, United States v. Rivera-Sanchez, 247 F.3d 905, 909 (9th Cir. 2001).

Here, the Immigration Judge Dean Lavay noted on his November 20, 1995, order that Defendant waived his right to appeal. There is nothing to suggest Defendant's waiver was anything but considered and intelligent. In the presence of a valid waiver of the right to appeal, exhaustion is a prerequisite to an alien's ability to collaterally attack the prior order. *See, e.g.,* United States v. Estrada-Torres, 179 F.3d 776, 781. Therefore, in order to grant Defendant's motion, this Court must also find that Defendant exhausted his administrative remedies. Title 8, United States Code, Section 1326(d)(1); see Garza-Sanchez, 217 F.3d at 808 ("A defendant charged under 8 U.S.C. § 1326 may not collaterally attack the underlying deportation order if he or she did not exhaust administrative remedies in the deportation proceedings, including direct appeal of the deportation order"). Here, Defendant makes no effort to prove that he attempted to exhaust his administrative remedies after his deportation order. Accordingly, because Defendant waived his right to appeal and failed to exhaust his administrative remedies, he cannot collaterally attack his 1995 deportation order.

2. The Proceedings Before the Immigration Judge Did Not Violate Defendant's Due Process Rights

Assuming, arguendo, that Defendant did not waive his right to appeal his 1995 deportation order, then he must show that his due process rights were violated by the immigration judge. A defendant who has not waived his right to appeal **and** has exhausted his administrative remedies can only collaterally attack a deportation proceeding by showing that: (1) his due process rights were violated by defects in his underlying deportation proceeding; and (2) he suffered prejudice. Arrieta, 224 F.3d at 1079

The Ninth Circuit has clarified that "[immigration judges] are not expected to be clairvoyant; the record before them must fairly raise the issue. . . ." Moran-Enriquez v. I.N.S., 884 F.2d 420, 422 (9th Cir. 1989). The Ninth Circuit has rejected the "proposition that an alien's waiver of the right to appeal a deportation order is invalid unless the [immigration judge] informed him or her of every potential ground for relief . . . as vague in principle and unworkable in practice." Garza-Sanchez, 217 F.3d at 810. Moreover, under certain circumstances, regulations governing such proceedings require the immigration judge to provide an alien notice of his "apparent eligibility" to apply for benefits. See 8 C.F.R. § 240.11(a)(2). The Ninth Circuit has defined "apparent eligibility" as a "reasonable possibility that the alien may be eligible." Bui v. I.N.S., 76 F.3d 268, 270 (9th Cir. 1996). However, the immigration judge is not required "to scour the entire record or to interrogate an alien regarding all possible avenues of relief." Bui, 76 F.3d at 271.

Defendant was not eligible for any types of relief because of his criminal history. *See* United States v. Gonzalez-Valerio, 342 F.3d 1051, 1056-57 (9th Cir. 2003 (defendant with pattern of serious criminal activity must demonstrate unusual or outstanding equities.) At the time of Defendant's hearing before an immigration judge in November, 1995, Defendant had already amassed a considerable criminal record which included:

- 1/16/92: Possession of Narcotics (California Health & Safety Code § 11350(a)) – 6 months
- 2/1/94: Indecent Exposure (Penal Code § 314.1) – 60 days
- 11/29/94: Indecent Exposure (Penal Code § 314.1) and Battery on a Peace Officer (Penal Code § 243(b)) – 180 days
- 9/11/95: Delivery of a Controlled Substance (Oregon Revised Statute §475.992) – 3 years probation

Therefore, the immigration judge was not required to inform Defendant about a voluntary return because no relief was available to him. Defendant was properly informed of his rights and cannot establish any due process violation.

Because Defendant's due process rights were not violated in connection with the Immigration Judge's 1995 order of removal, subsequent reinstatements of that valid order – including the reinstatements in 2003 and 2007 – did not violate Defendant's due process rights. United States v. Luna-Magdellaga, 315 F.3d 1224, 1226 (9th Cir. 2003).

3. Defendant Has Not Shown Any Prejudice

Once again, assuming arguendo that Defendant did not validly waive his right to appeal and that the immigration judge did not properly inform him of his rights, Defendant must "do more than demonstrate deprivation of the right to a direct appeal from a deportation order," he "also bears the burden of proving prejudice." United States v. Proa-Tovar, 975 F.2d 592, 595 (9th Cir. 1992). Defendant "can demonstrate prejudice in this case only by showing that he had plausible grounds for relief from deportation." United States v. Arce-Hernandez, 163 F.3d 559, 563 (9th Cir. 1999). This requires that he "produce some concrete evidence indicating that the violation of a procedural protection actually had the potential for affecting the outcome of his or her deportation proceedings." United States v. Cerda-Pena, 799 F.2d 1374, 1379 (9th Cir. 1986).

Here, Defendant falls far short of showing any prejudice because he cannot demonstrate any plausible ground for relief from deportation. As discussed above, Defendant was ineligible for voluntary departure. For this reason also, Defendant is unable to collaterally attack his 1995 deportation proceeding and his motion must fail.

4. Defendant Was Not Entitled To An Attorney At His Deportation Hearing

Defendant challenges his deportation on the basis of the denial of his right to an attorney. This argument is foreclosed by the precedent in this circuit. The Ninth Circuit has clearly held that an un-counseled deportation hearing may serve as the basis of a 1326 charge. United States v. Lara-Aceves, 183 F.3d 1007, 1012 (9th Cir. 1999), overruled *on other grounds* by United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001). As the Ninth Circuit explained, this is because "[i]t is axiomatic that civil and criminal proceedings differ substantially." Lara-Aceves, 183 F.3d at 1010. For this reason, "the full panoply of. . . procedural and substantive safeguards which are provided in a criminal proceeding are not required at a deportation hearing." United States v. Solano-Godines, 120 F.3d 957, 960-61 (9th Cir.1997). Given the civil nature of deportation proceedings, it is well established that aliens in such proceedings have no constitutional right to counsel under the Sixth Amendment. See United States v. Rivera-Sillas, 417 F.3d 1014, 1018 (9th Cir. 2005)(holding that alien had no Sixth Amendment right to counsel in deportation hearing); Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir.1986). Because Defendant had no Sixth Amendment right to counsel at his prior deportation hearing, it cannot have been a violation of the Sixth Amendment that he was deported at that hearing without counsel present.

The Ninth Circuit has squarely rejected Defendant's argument that Alabama v. Shelton, 122 S.Ct. 1764 (2002) requires a different result. See Rivera-Sillas, 417 F.3d at 1018. Shelton addressed the use of an un-counseled *criminal* conviction as a basis for imposing a custodial sentence at a later probation revocation hearing. The Supreme Court discussed extensively the Sixth Amendment right to counsel in *criminal* proceedings where a defendant risks the deprivation of his liberty. Shelton, 122 S.Ct. at 1767. As it addressed a prior *criminal* proceeding, Shelton is entirely inapposite to Defendant's case. The Rivera-Sillas court made this clear:

> Rivera-Sillas argues that his situation mirrors Shelton's, as he lacked counsel during the hearing underlying his 2000 deportation, and that deportation is now being used as a basis for imprisonment. This argument is without merit. The Alabama and United States Supreme Courts invalidated Shelton's sentence because he was entitled to counsel at his underlying criminal proceeding. In contrast, the law does not entitle aliens to counsel at deportation hearings. A deportation proceeding is administrative in nature and is not accompanied by a right to counsel. That the resultant deportation might be used against him in a later, unrelated criminal prosecution does not create a right to counsel. Thus, the fact that Rivera-Sillas had no counsel at his underlying deportation hearing creates no constitutional problem.

Rivera-Sillas, 417 F.3d at 1018.

Defendant's Sixth Amendment rights were not violated and his motion should be denied.

B. THE INDICTMENT IS SUFFICIENT

1. The Indictment Need Not Allege a Prior Conviction

Defendant argues that the Indictment is insufficient because it fails to allege (1) the date of the alleged removal, and (2) the temporal relationship between the prior conviction and removal.

These arguments are foreclosed by Ninth Circuit precedent in United States v. Covian-Sandoval, 462 F.3d 1090, 1096-98 (9th Cir. 2006) (holding that the fact of a prior conviction need not be submitted to the jury) and United States v. Salazar-Lopez, 506 F.3d 748, 752 (9th Cir. 2007) (holding that "the date of the removal, *or at least the fact that [defendant] had been removed after his* *conviction*, should have been alleged in the indictment and proved to the jury"). Defendant's contention that the Government must allege the temporal relationship between his prior conviction and his removal is interesting because the Government is quite certain Defendant would strenuously object if the Government had been any more specific regarding Defendant's prior convictions for possession of marijuana for sale or his prior illegal entry conviction in the charging document. In any event, the Indictment in this case specifically alleges the fact that Defendant was removed after the date of his relevant convictions. Defendant's motion to dismiss on this ground should be denied.

2. The Indictment Sufficiently Charges the Location and Mens Rea

Defendant argues that the Indictment is insufficient because it fails to allege (1) the location of the offense, and (2) mens rea.

Defendant's first contention is without merit because the indictment specifically charges that Defendant attempted to illegally enter the United States in the "Southern District of California." Further specificity regarding the location of Defendant's illegal entry is not required by Rule 7, which requires only that the "essential facts constituting the offense" be charged, not the particularized details. Fed. R. Crim. Pro. Rule 7(c)(1).

Contrary to Defendant's contention, nothing in United States v. Resendiz-Ponce, 127 S.Ct. 782 (2007), requires an indictment to allege the location of the offense with any more specificity. In Resendiz, the Court held that an indictment charging attempted entry does not need to allege a specific overt act. Id. at 787. The Court took a narrow view of the requirement that an indictment "contain[] the elements of the offense charged and fairly informs a defendant of the charge against which he must defend. . ." Id. at 788 (*quoting* Hamling v. United States, 418 U.S. 87, 119 (1974)). The Court held that it was sufficient that an indictment charge that a defendant "attempted to enter the United States"; no greater specificity is required. Id. at 787. The Court did not address whether the indictment must allege a specific location where the attempted entry occurred, but the logic of the Court's holding – which clearly favored a less-stringent requirement for specificity – would actually weigh against requiring a more specific allegation of location. The Court observed that the overt acts which were a substantial step towards the illegal entry in Resendiz included walking to an inspection area, presenting a misleading identification card, and lying to the inspector in an effort to gain entry. Id. at 788. "All three acts were . . . part of a single course of conduct culminating in the charged 'attempt.'" Id. Here, too, there are potentially numerous acts by Defendant – making smuggling arrangements with individuals in Mexico, approaching the U.S./Mexico border, crossing the U.S. Mexico border by climbing the fence or in some other fashion, hiding in the brush near the Border Road – which, either cumulatively or individually, could suffice to form the basis of an attempted entry charge. Those acts do not necessarily take place in the same location. It would therefore be counterintuitive for the Supreme Court to say that the indictment need not charge the specific overt act that formed the "attempt," and yet at the same time require an allegation of where the unspecified overt acts occurred. Therefore, the implication of the Court's holding in Resendiz is, by necessity, that an indictment charging an attempted entry does not need to specify the exact location of the attempt.

In an attempted entry case, the indictment must include the allegation of specific intent to enter the United States. United States v. Pernillo-Fuentes, 252 F.3d 1030, 1032 (9th Cir. 2001). Here, the indictment does in fact allege that defendant attempted to enter "with the purpose, i.e. conscious desire, to enter the United States." Because the indictment does allege Defendant's mens rea, Defendant's motion should be denied.

C. DEFENDANT'S MOTION TO SUPPRESS STATEMENTS SHOULD BE DENIED

Defendant asserts that his post-Miranda statements should be suppressed because they "may have been elicited" in violation of his Miranda rights and because they were involuntary. Def. Mtn. at 7. Neither contention is factually supported.

1. Standards Governing Admissibility of Statements

A statement made in response to custodial interrogation is admissible under Miranda v. Arizona, 384 U.S. 437 (1966) and 18 U.S.C. § 3501, if a preponderance of the evidence indicates that the statement was made after an advisement of rights, and was not elicited by improper coercion. See Colorado v. Connelly, 479 U.S. 157, 167-70 (1986) (preponderance of evidence standard governs voluntariness and Miranda determinations; valid waiver of Miranda rights should be found in the "absence of police overreaching"). Although the totality of circumstances, including characteristics of the defendant and details of the interview, should be considered, improper coercive activity must occur for suppression of any statement. See id. (noting that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'"); cf. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) ("Some of the factors taken into account have included the youth of the accused; his lack of education, or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.") (citations omitted). While it is possible for a defendant to be in such a poor mental or physical condition that he cannot rationally waive his rights (and misconduct can be inferred based on police knowledge of such condition, Connelly, 479 U.S. at 167-68), the condition must be so severe that the defendant was rendered utterly incapable of rational choice. See United States v. Kelley, 953 F.2d 562, 564 (9th Cir.1992) (collecting cases rejecting claims of physical/mental impairment as insufficient to prevent exercise of rational choice).

2. Standards Governing Grant or Denial of Evidentiary Hearing

Under Ninth Circuit and Southern District precedent, as well as Southern District Local Criminal Rule 47.1(g)(1)-(4), a defendant is entitled to an evidentiary hearing on a motion to suppress only when the defendant adduces specific facts sufficient to require the granting of the defendant's motion. See United States v. Batiste, 868 F.2d 1089, 1093 (9th Cir. 1989) (where "defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer, ... the district court was not required to hold an evidentiary hearing"); United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal. 1991) (boilerplate motion containing indefinite and unsworn allegations was insufficient to require evidentiary hearing on defendant's motion to suppress statements); Crim. L.R. 47.1. The local rule further provides that "the Court need not grant an evidentiary hearing where either party fails to properly support its motion for opposition."

Defendant has as much information as the Government in regards to the statements he made. See Batiste, 868 F.2d at 1092. At least in the context of motions to suppress statements, which require police misconduct suffered by Defendant while in custody, Defendant certainly should be able to provide the facts supporting the claim of misconduct. Finally, any objection that 18 U.S.C. § 3501 requires an evidentiary hearing in every case is of no merit. Section 3501 requires only that the Court make a pretrial determination of voluntariness "out of the presence of the jury." Nothing in section 3501 betrays any intent by Congress to alter the longstanding rule vesting the form of proof on matters for the court in the discretion of the court. Batiste, 868 F.2d at 1092 ("Whether an evidentiary hearing is appropriate rests in the reasoned discretion of the district court.") (citation and quotation marks omitted).

3. Adequate Proof to Support Rejection of a Motion to Suppress

The Ninth Circuit has expressly stated that a United States proffer based on the statement of facts attached to the complaint is alone adequate to defeat a motion to suppress where the defense fails to adduce specific and material facts. See Batiste, 868 F.2d at 1092. Moreover, the Ninth Circuit has held that a District Court may properly deny a request for an evidentiary hearing on a motion to suppress evidence because the defendant did not properly submit a declaration pursuant to a local rule. See United States v. Wardlow, 951 F.2d 1115, 1116 (9th Cir. 1991); United States v. Howell, 231 F.3d 616, 620 (9th Cir. 2000) ("An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist."); see also United States v. Walczak, 783 F. 2d 852, 857 (9th Cir. 1986) (holding that evidentiary hearings on a motion to suppress are required if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to whether contested issues of fact exist). Even if Defendant provides factual allegations, the Court may still deny an evidentiary hearing if the grounds for suppression consist solely of conclusory allegations of illegality. See United States v. Wilson, 7 F.3d 828, 834-35 (9th Cir. 1993) (District Court Judge Gordon Thompson did not abuse his discretion in denying a request for an evidentiary hearing where the appellant's declaration and points and authorities submitted in support of motion to suppress indicated no contested issues of fact).

In this case, the probable cause statement attached to the complaint clearly articulates that Defendant was read his Miranda rights. The probably cause statement further alleges that Defendant stated that he understood his rights and agreed to talk without the presence of an attorney. Defendant has failed to provide declarations alleging specific and material facts that contradict the summary in the complaint and probable cause statement. Therefore, the Court should deny Defendant's motion based solely on the statement of facts attached to the complaint in this case, without any further showing by the United States. Moreover, Defendant had an opportunity, in his moving papers, to proffer any facts alleging violations of his rights, but failed to do so. Instead, Defendant merely cited generic Miranda law. Defendant's suggestion of a possible Miranda violation fails to demonstrate there is a disputed factual issue requiring an evidentiary hearing. See Howell, 231 F.3d at 623.

As such, this Court should deny Defendant's motion to suppress and hold, based on the Statement of Facts attached to the Complaint in this case, that Defendant's statements were voluntarily made.

4. Defendant's Post-Miranda Statements Were Voluntary

Defendant does not provide any basis for which his post-arrest statements should be suppressed. Defendant failed to submit a declaration as required by the local rules, and thus fails to adduce specific and material facts to warrant an evidentiary hearing.

In evaluating the voluntariness of post-arrest statements, courts ask "whether, considering the totality of the circumstances, the Government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988); see also United States v. Miller, 984 F.2d 1028, 1031 (9th Cir. 1993) (crucial question is whether the defendant's will was overborne when he confessed). The relevant circumstances include both the characteristics of the accused and the details of the interrogation. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). At a minimum, coercive police activity is "a necessary predicate" to finding a confession involuntary. Colorado v. Connelly, 479 U.S. 157, 167 (1986). A confession is voluntary if it is the "product of a rational intellect and a free will." Medeiros v. Shimoda, 889 F.2d 819, 823 (9th Cir.1989) (quoting Townsend v. Sain, 372 U.S. 293, 307 (1963)). The crucial question is whether Defendant's will was overborne when he confessed. See United States v. Miller, 984 F.2d 1028, 1031 (9th Cir. 1988).

In the present case, there is no evidence to suggest that Defendant's statements were the result of any coercion or improper inducement. Defendant has provided no articulable facts in support of his claim that the statements made at the time of his arrest violated Miranda or were involuntary. Without specific supporting facts showing material facts in dispute, Defendant's motion should be denied without a hearing. field statements were voluntary and lawfully elicited. They should therefore be admissible.

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D. MOTION FOR LEAVE TO FILE FURTHER MOTIONS

The United States does not object to the granting of leave to allow Defendant to file further motions, as long as the order applies equally to both parties and additional motions are based on newly discovered evidence or discovery provided by the United States subsequent to the instant motion at issue.

IV

CONCLUSION

For the foregoing reasons, the Government respectfully requests that Defendant's motions be denied except where unopposed.

DATED: March 25, 2008.

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

s/ Rebecca Kanter
REBECCA S. KANTER
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JORGE HERNANDEZ, Defendant.	)	Criminal Case No. 07CR2953-IEG CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, REBECCA S. KANTER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE AND OPPOSITION** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Knut Johnson

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 2008.

s/ Rebecca Kanter
REBECCA S.KANTER
Assistant U.S. Attorney